

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 464 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

THURAKAKA KANDY AMMAD

Versus

PG RAMRAKHIYANI

PRINCIPAL SECRETARY

Appearance:

MR RS GAJJAR & Mr.A.Q.Ansari,for Petitioner
Mr.Samir Dave, A.G.P. for Respondent No. 1 & 3.
MS PJ DAVAWALA for Respondent No. 2

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 04/10/1999

ORAL JUDGEMENT

Heard learned Advocates Mr. R.S. Gajjar & Mr.A.Q. Ansari for the petitioner, learned A.G.P Mr. Samir Dave for the respondents nos.1 & 3 and Ms. Parinda J.Davawala for the respondent no.2.

1. One Yusufkhan Mohmedkhan Pathan, the next friend of the detenu Shri T.K. Ammad has filed the present petition under Article 226 of the Constitution of India

challenging the detention order dated 17-10-1998 passed by the respondent no.1-the Principal Secretary to the Government of Gujarat, Home Department against the detenu Shri T.K. Ammad in exercise of powers conferred vide Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974(" COFEPOSA" for short).

2. The grounds of detention of even date produced on record vide Annexure "B" indicate inter alia that on 18-1-1998, the Customs Authority at Ahmedabad International Airport recovered a packet containing 48 gold biscuits and US\$ 3110 hidden in a tool-box of the Indian Airlines Passenger Coach bearing no.GJ-1-X-4042 which brought the passengers of Flight no.IC 886 coming from Muscat to the baggage hall from the tarmac of the Aircraft. That on further investigation three persons, namely, Shri T.K. Ammad(detenu), K.P. Basheer and K.K. Thomas were arrested in respect to recovery of said articles and produced before the Additional Chief Metropolitan Magistrate, Ahmedabad who remanded all of them to the judicial custody. That the gold and foreign currency contained in the said packet were seized by the Customs Authority under a bona fide belief that same were liable for confiscation under the provisions of the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973.

That the matter was further investigated by the Customs Authorities and statement of above said three persons were recorded under Section 108 of the Customs Act, 1962. The facts stated in the grounds of detention further indicate as under:

(a) That the said Shri K.P. Basheer has been working in Muscat since last 10 years; that he was acquainted with one Moudin who had asked said Shri Basheer to work as a Supervisor of gold consignment being sent to India by said Moudin. That since 1994 the said Shri Basheer has been working as a Supervisor of gold consignment being sent to India by Shri Moudin for the payment of Rs.3000/- to Rs.5000/- per trip alongwith to and fro ticket. That the said gold consignments were being delivered to one Hamzabhai of Bombay who was also acting as a local Manager of said Shri Moudin. That said Shri Basheer had supervised such delivery of gold consignment through Ahmedabad International Airports about 10 times and through Bombay Airports about 12 times prior to said incident. That on 16-1-1998, said Shri Basheer had come to Bombay from Muscat and had contacted said Hamzabhai who had asked Shri Basheer to proceed to Ahmedabad by

evening train. That Shri Basheer was informed that one T.K. Ammad(detenu) is arriving at Ahmedabad by Indian Airlines Flight no.IC 886 on 18-1-1998 with a gold consignment. That Shri Basheer arrived at Ahmedabad on 17-1-1998 and had checked in room no.33 at Hotel Amber. That in the evening Shri Basheer had gone to Lal-darwaja to meet one Aziz Mamu who happens to be receiver of the gold consignment being cleared at Ahmedabad. That Shri Bashseer has been in contact with said Shri Aziz since last about 3 years prior to the incident. That on 17-1-1998, the said Aziz Mamu had told to Shri Basheer that he would be informed about the arrival of Shri T.K. Ammad(detenu) by IA Flight no.IC 886 from Muscat with gold consignment in the morning of 18-1-1998. That the said gold consignment would be delivered to Shri Basheer at his hotel room. That thereafter, Shri Basheer had to take said Shri T.K.Ammad(detenu) to Bombay alongwith gold consignment for delivery to said Hamzabhai.

(b) It also appears from the grounds of detention that Shri T.K. Ammad (detenu) had settled in Muscat since last 17 years and he also knew Mr. Mouidin who has been working as a driver of a gold dealer. That said Shri Mouidin had handed over said packet which contained 48 pieces of gold and US\$ 3110 to the detenu-Shri T.K. Ammad at Muscat Airport to carry the same at Ahmedabad and to deliver the same to Shri Basheer. The detenu-T.K. Ammad was also advised that at Ahmedabad Airport there would be a bus parked near the aircraft and there would not be any light in the bus. That after ascertaining the identity of the vehicle, Shri Ammad (detenu) should get into the vehicle and reach the rear seat of the driver side. That there he would find a small tool box which could be opened with his little finger. That he should deposit the said packet of gold in the said tool-box. The detenu-Shri Ammad was also instructed that thereafter on clearance he had to contact one Shri K.P. Basheer on a given telephone number. The detenu-Shri T.K. Ammad having acted as per the said direction on 18-1-1998 had reached the baggage hall and opted for the green channel. That thereafter, he tried to contact Shri K.P. Basheer on a given telephone number and at that time officials of the Customs Department apprehended him. That the detenu-T.K. Ammad explained to the said officers that he was trying to contact Shri Basheer on telephone number 5356450. That the officers of the Customs department acting on the said information traced the said K.P. Basheer at hotel Amber and apprehended him.

(c) That the driver of Indian Airlines Passenger Coach Shri K.K.Thomas has been serving at Indian Airlines

S.V.P. International Airport, Ahmedabad since last 10 months. That he has been driving Coach No.GJ-1-X-9042 as well as a small bus bearing no.GJ-1-T-5249 at Airport to carry the passengers from aircraft tarmac to arrival terminal and also to carry the staff members of the Indian Airlines Ltd. from Airport to the office during morning hours as well as night hours duty shifts. That on 7-1-1998 one Shri Aziz met him outside the Airport terminal and told him that one of the persons of Shri Aziz would bring gold in big quantity from Muscat in Indian Airlines Flight no.IC 886 and would drop the said gold packet in the cavity of tool box of the Indian Airlines Coach. That Shri K.K. Thomas was promised to be paid Rs.10,000/-per trip. That Shri K.K. Thomas agreed to the said proposal and promised Shri Aziz to deliver the consignment of gold at turning point near Lucky Restaurant Lal-darwaja. It appears from the said grounds of detention that according to the above stated arrangement driver Shri K.K. Thomas had delivered one consignment of gold to said Shri Aziz on 9-1-1998 in the early hours of morning while carrying the staff members of Indian Airlines to the City Office. However, Shri Aziz had told to Shri K.K. Thomas that payment for the said trip shall be made after the second consignment is delivered on 18-1-1998.

That on 18-1-1998 Shri K.K.Thomas was assigned the duty of driving staff bus bearing no.GJ-1-T-5249, however he exchanged the duty with other driver-Shri Vyas and put himself as a driver to drive the passenger coach bearing no.GJ-1-X-9042 at 5.00 a.m. to carry the passengers of Flight no.IC 886 of Muscat to baggage hall. That after he carried the passengers to arrival terminal on 18-1-1998 when he went inside the bus to collect the consignment of gold from the tool-box he found that the Customs Officers were entering the bus and they have recovered the gold consignment from the said tool-box cavity. That said Shri K.K. Thomas was also arrested by the Customs Authorities.

2A. That after due investigation and inquiry, the Customs Authority has filed a criminal complaint against T.K. Ammad(detenu), K.P. Bahseer and K.K. Thomas in the Court of Additional Chief Metropolitan Magistrate, Ahmedabad for having committed an offence made punishable under Section 135 of the Customs Act,1962. That the bail application moved by the detenu-T.K.Ammad to trial Court as well as to the Court of Addl. Sessions Judge, Ahmedabad and High Court were rejected successively and as such Shri T.K. Ammad(detenu) has remained in judicial custody. That thereafter in consideration of material

placed before him, the detaining authority has passed the impugned order.

3. That the respondent no.1 as detaining authority has observed in the grounds of detention that in consideration of material and relevant fact if Shri T.K. Ammad is not detained preventively he is likely to get released on bail or otherwise continue his prejudicial activity of abetting smuggling of gold in India, and as such, it is necessary to pass the detention order under "COFEPOSA". Hence, the impugned order is passed.

That alongwith the detention order vide committal order, the detenu-T.K.Ammad is directed to be kept at Central Prison, Ahmedabad and was to be treated as Class II prisoner.

4. Shri R.S. Gajjar, learned Advocate appearing for the petitioner has assailed the impugned order passed against the detenu on numerous grounds. It has been contended that incident of recovering alleged smuggled gold has taken place on 18-1-1998 while the impugned order of detention is passed as late as on 17-10-1998. That on account of said undue delay, the subjective satisfaction reached by the detaining authority has been vitiated and the order is bad in law. To support the submission, Shri Gajjar has referred to and relied on the observations made by the High Court of Bombay in the matter of SHAKEEL SAIT VS. C.D.SINGH & ORS (1997 IV LJ 437) decided on 17-6-1997 vide Criminal Writ Petition no.429 of 1996.

5. As against that Shri Samir Dave, learned A.G.P. and Miss Parinda J. Davawala appearing on behalf of the respondents have referred to and relied on the statement made by the Under Secretary to the Government of Gujarat Shri J.R. Rajput in his affidavit dated 9th September, 1999. That vide paragraph 11 it has been explained that on receipt of proposal from Sponsoring Authority, it was necessary to call for additional documents and as the detenu and/or the co-detenu were not knowing English and Gujarati; the translation of all the documents into Malayalam and/or English was necessary and owing to that process, time was consumed in formulating the grounds of detention. It is submitted on behalf of the respondents that the detaining authority was conscious of the fact in respect to the time gap between the date of incident and the date on which action was taken, however, on account of administrative procedure unavoidable delay had occurred and said explanation is also given in the grounds of detention which is just and reasonable. To

support the said submission, reliance is placed in the matter of HARISH ANAND VS. UNION OF INDIA & ORS. (1996(1) G.L.H. 234) wherein it is held that the delay of 13 months , in the instant case, cannot be said to have occurred on account of laxity on the part of the Sponsoring Authority or the detaining authority but was a result of full and careful consideration of the facts and circumstances of the case which provides a satisfactory explanation.

6. On behalf of the respondents reliance is also placed on the observations made by this High Court in the matter of JEEVAN G. TANDEL VS. UNION OF INDIA & ORS.(1996(1) G.L.H. 419 wherein it is observed that:

" Merely on account of delay in making an order of detention under the law like "COFEPOSA", the Court should not assume that if such delay is not explained satisfactorily, then, it would give rise to an inference that there was no sufficient material for subjective satisfaction or that such subjective satisfaction was not genuinely rendered. Delay should be fatal only when the grounds of detention are stale or illusory or when there is no real nexus between the grounds and the detention order."

On the basis of the said observation, though there was delay of one year and twenty-seven days, the Court upheld the order.

7. In the instant case, it cannot be disputed that the detenu and his accomplice said Shri K.P. Basheer & K.K.Thomas were involved in smuggling activities since long and have been acting as a member of syndicate. That relevant material in respect to each of the participants was not only required to be collected but verified, processed and translated into different languages to comply with the prescribed procedure. That in HARISH ANAND's case (supra). This Court vide paragraph 17 of the judgment has made following relevant and material observations:

"17. The test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts and the order of detention. It is a subsidiary test evolved by the Court for the purpose of determining the main question whether the past activity of the detenu is such that from it a reasonable prognosis can be made as to the future conduct of the detenu and its utility, therefore, lies only in so far as it subserves that purpose and it

cannot be allowed to dominate or drown it. The prejudicial act of the detenu may in a given case be of such a character as to suggest that it is a part of an organized operation of a complex of agencies collaborating to clandestinely and secretly carry on such activities and in such a case the detaining authority may reasonably feel satisfied that the prejudicial act of the detenu which has come to light cannot be a solitary or isolated act, but must be a part of a course of conduct of such or similar activities clandestinely or secretly carried on by the detenu and it is, therefore, necessary to detain him with a view to preventing him from indulging in such activities in future."

Similarly, in JEEVAN G. TANDEL's case (supra), the following observations are made vide Para 10A which reads as under:

"10A. In view of the above facts the question which arises for consideration of the Court is to whether delay in passing the detention order can be said to have vitiated subjective satisfaction of the detaining authority that it was necessary to detain the petitioner with a view to preventing him from smuggling goods? In the case of Rajendrakumar Natwarlal Shah v. State of Gujarat and Others. 1988 S.C. 1255, the Supreme Court has emphasized and made it clear for the guidance of different High Courts that a distinction must be drawn between the delay in making of detention like under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of Article 22(5) of the Constitution. The Supreme Court has highlighted the principle that in the cases of more delay in making an order of detention under a law like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering, who owing to their large resources and influence, have been posing a serious threat to the economy and thereby to the security of the Nation, the Courts should not merely on account of delay in making of an order of detention assume that, such delay if not satisfactorily explained must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. The Supreme Court has further cautioned that taking of such view would not be warranted unless the Court finds that the grounds are stale or illusory or that there is no real nexus between the grounds and the

impugned order of detention. The pertinent observations which have been made by the Supreme Court are to be found in para 9 of the reported judgment of the Supreme Court which are as under:

"In the enforcement of a law relating to preventive detention and Prevention of Smuggling Activities Act, 1974 there is apt to be some delay between the prejudicial activities complained of under Section 3(1) of the Act and the making of an order of detention. When a person is detected in the act of smuggling or foreign exchange racketeering, the Directorate of Enforcement has to make a thorough investigation into all the facts with a view to determine the identity of the persons engaged in these operations which have a deteterious effect on the national economy. Quite often these activities are carried on by persons forming a syndicate or having a wide network and therefore this includes recording of statements of persons involved, examination of their books of accounts and other related documents. Effective administration and realization of the purpose of the Act is often rendered difficult by reason of the clandestine manner in which the persons engaged in such operations carry on their activities and the consequent difficulties in securing sufficient evidence to comply with the rigid standards, insisted upon by the Courts. Sometimes such investigation has to be carried on for months together due to the magnitude of the operations. Apart from taking various other measures i.e. launching of prosecution of the persons involved for contravention of the various provisions of the Act in question and initiation of the adjudication proceedings, the Directorate has also to consider whether there was necessity in the public interest to direct the detention of such person or persons under Section 3(1) of the Act with a view to preventing them from acting in any manner prejudicial to the conservation and augmentation of foreign exchange or with a view to preventing them from engaging in smuggling of goods, etc. the proposal has to be cleared at the highest quarter and is then placed before a Screening Committee. For ought we know, the Screening Committee may meet once or twice a month. If the Screening Committee approves of the proposal, it would place the same before the detaining authority. Being conscious that the requirements of Article 22(5) would not be satisfied unless the basic facts and materials which weighed with him in reaching his subjective satisfaction, are communicated to the detenu and the likelihood that the Court would examine the ground specified in the order of detention to see whether

they were relevant to the circumstances under which the impugned order was passed, the detaining authority would necessarily insist upon sufficiency of the grounds which would justify the taking of the drastic measure of preventively detaining the person".

8. Considering the facts and circumstances apparent from the grounds of detention stated hereinabove in the context of above stated observations made by this Court it is difficult to uphold the submission urged on behalf of the petitioner that on account of undue delay the impugned action of passing the detention order has become invalid and as a result the detention order deserves to be quashed and set aside.

9. Mr. R.S. Gajjar, learned Advocate appearing on behalf of the petitioner has further urged that the impugned order passed against the detenu suffers from the infirmity of non application of mind. It is submitted on behalf of the detenu that bail application moved by the petitioner to all the Courts from trial Court to High Court were rejected and on the date of passing of the order, the petitioner was in judicial custody. That there was no imminent cause in near future that the detenu would be released on bail. Under the circumstances, no action under Section 3(1) of "COFEPOSA" was warranted, and as such, the impugned order deserves to be quashed and set aside. To support the submission, Shri Gajjar has referred to and relied on the observations made by the High Court in the matter of RIVADENEYTA RICARDO AGUSTIN VS. GOVERNMENT OF THE NATIONAL CAPITAL TERRITORY OF DELHI AND OTHERS (1994 SUPP (1) SCC 597)

10. As against that learned A.G.P. Mr. Samir Dave relying on the observations made by the Supreme Court in the matter of GHETU SHEIKH VS. STATE OF WEST BENGAL(AIR 1975 SC 982) has urged that the detaining authority was alive to the fact that at the relevant time the petitioner-dtenu was in judicial custody, however, in the facts and circumstances of the case there was no bar whereby the petitioner could not move any bail application in future. That considering the background and antecedents of the party, the detaining authority has rightly exercised the discretion in passing the impugned order.

11. That in the matter of JEEVA VEIYAPURI MADRASI VS. COMMISSIONER OF POLICE, AHMEDABAD & ANR.(1991 G.L.H. 346) this Court has expressed the view that the proposition of law is well settled to the extent that

while passing the detention order the detaining authority should be alive to the fact that the detenu is in judicial custody, however, it is for the detaining authority to form a subjective satisfaction that, in the facts and circumstances of the case as well as attending circumstances, the possibility of release of the detenu on bail cannot be ruled out and thereby the detenu could resort to continue his prejudicial activity and as such power conferred by Section 3(1) of "COFEPOSA" could be exercised. Furthermore, in GHETU SHEIKH'S case (Supra), the Supreme Court has made the following material and relevant observations in paragraph 7 of the judgment:

"7. It is now settled law that if from the circumstances of a particular case, the detaining authority is satisfied that the detention or jail custody of the detenu is about to terminate shortly and further that in view of his prejudicial activities in the proximate past, an apprehension of his acting in the same prejudicial manner after his release exists, the authority may, if the conditions of Section 3 are satisfied, validly make an order of detention even while the detenu is still in jail. The preventive jurisdiction which the authority exercises under the Act is different from the jurisdiction to prosecute him for a substantive offence. In dealing with this question however considerations of proximity of time will be a relevant factor."

11. In the instant case, it can hardly be disputed that the detenu was not involved in smuggling of huge quantity of gold. That the material produced before the detaining authority disclose the antecedents of the detenu and his accomplice and the background in which the activity for smuggling of gold in India was being carried out tripwise by the detenu as a member of the syndicate and his accomplice. The grounds of detention clearly disclose that the detaining authority had exercised the power having kept in mind all the relevant and material factors and the fact that release of the petitioner on bail and the likelihood of the detenu repeating his prejudicial activity cannot be ruled out. In view of the same the second contention urged on behalf of the petitioner detenu also cannot be accepted.

12. Shri R.S. Gajjar, learned Advocate appearing for the petitioner has submitted that as stated in the grounds of detention personal search of Shri T.K. Ammad was carried out when he came out of a baggage hall and was trying to make a telephone call. It also appears from the said material that a letter and telephone number

were recovered, and as such, the Customs Authority must have drawn a Panchnama and seized the same. However, no such document have been supplied to the petitioner alongwith the detention order. That thereby the petitioner is prevented from making an effective representation against his detention. That the said act and action on the part of the detaining authority being breach of constitutional imperative under Article 22(5), it has rendered the impugned order invalid, and as such, the impugned order of detention should be quashed and set aside.

13. On scrutiny of the grounds of detention, it appears that nowhere the detaining authority has referred to or relied on any such document of Panchnama as contended on behalf of the petitioner. On the contrary, it appears that the Customs Authority has recorded statement of the petitioner under Sec.108 of the Customs Act, 1962. That the petitioner has admitted such statement and had explained to the authority that he was trying to establish a contact with Shri K.P. Basheer and on the basis of the said information and telephone number Shri Basheer was traced at Amber Hotel and was apprehended. Thus, as detaining authority has not referred to and relied on any document like Panchnama as contended on behalf of the petitioner, the contention cannot be accepted. That the submission made on behalf of the petitioner that in a statement recorded under Section 108 of the Customs Act, 1962, the petitioner has stated that on his personal search a letter and note containing telephone numbers were recovered. However, such statement cannot cast any obligation on the detaining authority to provide any such document for more than one reason. It is necessary to note that there is nothing on record to show that any such Panchnama was drawn even if petitioner had stated in his statement under Section 108 of the Customs Act, 1962 that his personal search was taken. That such documents not being *pari passu* is not required to be supplied to the detenu alongwith the detention order. Furthermore, despite knowing the fact the petitioner had failed to make any demand for such document so as to make effective representation though separate representation to State Government as well as Central Government were made. In view of the same, I do not find any substance in the said contention, and as such, it stands rejected.

14. Learned Advocate Mr. R.S. Gajjar has also urged that maximum punishment prescribed for the offences alleged to have been committed by the petitioner under Section 135 of the Customs Act, 1962 is not more than

three years and under certain circumstances, it could be seven years. In view of the said fact drastic action of passing detention order on the same fact is harsh and uncalled for which also suggests non application of mind on the part of the detaining authority. The submission could hardly be accepted in view of the following observations made by this Court in paragraph 25 of the judgment rendered in the matter of HARISH ANAND'S case(Supra):

"25. As emphasised by the Supreme Court in the case of GORA (supra) the prejudicial act of the detenu may in a given case be of such a character as to suggest that it is a part of an organised operation of a complex of agencies collaborating to clandestinely and secretly carry on such activities and in such a case the detaining authority may reasonably feel satisfied that the prejudicial act of the detenu which has come to light cannot be a solitary or isolated act, but must be a part of a course of conduct of such or similar activities clandestinely or secretly carried on by the detenu and it is, therefore, necessary to detain him with a view to preventing him from indulging in such activities in future. The manner in which the detenu agreed to transport contraband ball bearings from Jamnagar to Delhi after examining sample of ball bearings, the use of Code number, etc. would indicate that the detenu had engaged himself in an organised manner in transporting smuggled goods. From the facts and circumstances of the case, it is apparent that the detenu and others had formed a syndicate and were engaged in an organized manner in smuggling activities which has several facts. The single act of transporting smuggled goods showed preparation and full knowledge on the part of the detenu indulging in act of prohibited nature. Therefore, it can provide valid ground for detention. The volume and magnitude or smuggling activity as unfolded in the grounds of detention and value of contraband goods seized indicates its propensity that it was well planned and premeditated, and therefore, the order of detention can be passed. Under the circumstances, the submission that on the basis of solitary incident order of detention could not have been passed cannot be accepted."

15. On the basis of the aforesaid observations, I hold that the petition fails and stands disposed of as rejected. Rule is discharged.

stanley-akt.

